

BEFORE
THE PUBLIC SERVICE COMMISSION
OF SOUTH CAROLINA
DOCKET NO. 2017-305-E

IN RE:

Request of the South Carolina Office of)	BRIEF OPPOSING SCE&G'S
Regulatory Staff for Rate Relief to)	MOTION TO DISMISS REQUEST OF
SCE&G Rates Pursuant to)	THE SOUTH CAROLINA OFFICE OF
S.C. Code Ann. § 58-27-920)	REGULATORY STAFF FOR RATE
)	RELIEF TO SCE&G RATES
)	PURSUANT TO
)	S.C. CODE ANN. § 58-27-920

Procedural History

1. Pursuant to Public Service Commission of South Carolina ("the Commission") Order No. 2017-58-H, the South Carolina Office of Regulatory Staff ("ORS") submits this Brief ("Brief") opposing South Carolina Electric & Gas Company's ("SCE&G") Motion to Dismiss ORS's Request for Rate Relief Pursuant to S.C. Code Ann. § 58-27-920 ("Request").

2. On September 28, 2017, SCE&G filed a Motion to Dismiss ORS's Request.

3. On October 10, 2017, the Commission issued Order No. 2017-58-H setting forth a briefing schedule on SCE&G's Motion to Dismiss, and this Brief is filed pursuant to that schedule.

Background

4. SCE&G is 55% owner of the V.C. Summer Nuclear Units 2 and 3 ("the Units") and South Carolina Public Service Authority ("Santee Cooper"), an entity not regulated by the Commission, owns the remaining 45%.

5. Westinghouse Electric Corporation, LLC (“WEC”) was the primary contractor for the Units prior to its March 29, 2017 bankruptcy declaration.

6. On July 27, 2017, Toshiba Corporation entered into an agreement with SCE&G and Santee Cooper, which set the limit of Toshiba’s guarantee obligation, as the former parent company of WEC, at approximately \$2.168 billion (“Guarantee Payment”) to be paid out over five years in full satisfaction of Toshiba’s obligations of WEC under the engineering, procurement, and construction contract for the Units.¹ As a 55% owner of the Units, SCE&G was entitled to approximately \$1.192 billion of the Guarantee Payment.

7. On July 31, 2017, SCE&G announced its intent to seek approval of an abandonment plan for the Units.

8. On September 26, 2017, the South Carolina Office of the Attorney General issued an Opinion (“Attorney General Opinion”) stating that portions of the South Carolina Base Load Review Act (“BLRA”) are constitutionally suspect. The BLRA allowed SCE&G to adjust rates annually through a process called “revised rates” to cover financing of the Units’ construction.

9. On September 26, 2017, after reviewing the Attorney General Opinion and considering other matters including a previously undisclosed report by the Bechtel Power Corporation (“Bechtel”), ORS filed pursuant to S.C. Code Ann. § 58-27-920, a Request with the Commission asking that the Commission Order: (1) SCE&G to immediately suspend all revised rates collections, and (2) further action including credits to future bills or refunds if the General Assembly amends or revokes the BLRA or a court of competent jurisdiction declares the BLRA unconstitutional. As noted in the Request, ORS was also aware of allegations that SCE&G failed to disclose information that should have been disclosed to ORS and the Commission.

¹ The Toshiba press release issued July 28, 2017 is attached to ORS’s Motion to Amend as Exhibit 1.

10. On September 27, 2017, the day after ORS filed its Request, SCANA Corporation, SCE&G's parent corporation, issued a press release indicating that SCE&G had sold to Citibank, N.A. ("Citibank") for approximately \$1.016 billion all future Guarantee Payments that Toshiba owed to SCE&G after Toshiba's October 2017 payment.²

11. On September 28, 2017, SCE&G filed a Motion to Dismiss ORS's Request.

12. On October 2, 2017, Toshiba made a payment of \$150 million towards satisfaction of Toshiba's Guarantee Payment with \$82.5 million going towards SCE&G's 55% share.

13. On October 6, 2017, ORS filed a Response to SCE&G's Motion to Dismiss.

14. On October 17, 2017, ORS filed a Motion to Amend its Request requesting that the Commission consider the appropriate application of the Citibank and Toshiba payments to benefit SCE&G customers and any other action or relief the Commission may deem necessary or appropriate.

15. On October 27, 2017, SCE&G filed a Motion to Strike ORS's Motion to Amend resulting in the Commission issuing a schedule in Order No. 2017-68-H for briefs to be filed on the matter.

16. On October 31, 2017, SCE&G filed a brief in support of its Motion to Dismiss pursuant to the briefing schedule set forth in Order No. 2017-58-H.

17. On November 9, 2017, ORS filed a brief in support of its Motion to Amend pursuant to Order No. 2017-68-H.

18. This second ORS Brief is filed pursuant to Order No. 2017-58-H in opposition to SCE&G's Motion to Dismiss.

² The press release is attached to the Motion to Amend as Exhibit 2.

ORS BRIEF IN OPPOSITION TO SCE&G'S MOTION TO DISMISS

19. SCE&G asks ORS's Request to be dismissed based on ORS failing to conduct a preliminary investigation required by S.C. Code Ann. § 58-27-920, failing to provide a factual basis for its Request, and other grounds discussed in its Motion to Dismiss and in its Brief in Support of its Motion to Dismiss.

20. ORS opposes SCE&G's Motion to Dismiss, incorporates the discussions already set forth in its Request filed on September 26, 2017, Motion to Amend filed on October 17, 2017, and brief in support of the Motion to Amend filed on November 9, 2017. ORS also adds the information below.

21. In reviewing a Motion to Dismiss, if the facts and inferences drawn from the facts alleged in the complaint, viewed in the light most favorable to the plaintiff, would entitle the plaintiff to relief on any theory, then the grant of a motion to dismiss for failure to state a claim is improper. Brazell v. Windsor, 384 S.C. 512, 515, 682 S.E.2d 824, 826 (2009). In this case, ORS respectfully submits that the pleadings submitted in this docket provide support for the Commission to take action pursuant to S.C. Code Ann. § 58-27-920 so that SCE&G's Motion to Dismiss should be denied.

22. S.C. Code Ann. § 58-27-920 states:

SECTION 58-27-920. Schedule of rates put into effect after preliminary investigation.

The commission may, after a preliminary investigation by the Office of Regulatory Staff and upon such evidence as to the commission seems sufficient, order any electrical utility to put into effect a schedule of rates as shall be deemed fair and reasonable, within such time as may be prescribed by order of the commission, which shall be not less than fifteen days, and an attested copy of the order must be served upon the utility and the Office of Regulatory Staff by registered mail or otherwise as provided by law.

23. At the time ORS filed its Request on September 26, 2017, ORS's investigation consisted of reviewing the Attorney General Opinion and consideration of allegations about information and documents that had been withheld by SCE&G from ORS and the Commission, including a previously undisclosed Bechtel report.

24. While the factual revelations surrounding the abandonment of the Units are fluid and continue to evolve, two profound Bechtel³ documents contain information that ORS and the Commission were denied the opportunity to know about or consider. These documents, discussed below, provide a sufficient basis for the Commission to deny SCE&G's Motion to Dismiss and take the action requested by ORS pursuant to S.C. Code Ann. § 58-27-920.

25. The first Bechtel document is a Bechtel Project Assessment Report dated February 6, 2016 ("2016 Final Report") attached as Exhibit 1.⁴ On page 1 of the Executive Summary, Bechtel states that it performed an assessment of the project for the Units with the objective of assisting the owners, SCE&G and Santee Cooper "to better understand the current status and potential challenges of the project to help ensure the project is on the most cost efficient trajectory to completion." The assessment was done in accordance with a Professional Services Agreement signed on August 6, 2015 between Bechtel and Smith, Currie & Hancock LLP. On information and belief, Smith, Currie & Hancock LLP acted as counsel for SCE&G and Santee Cooper.

26. Page 3 of the 2016 Final Report has the following curious disclaimer: "A specific assessment of the project schedule is not included in this report." This disclaimer stood out to

³ According to Bechtel's website, "Bechtel is one of the most respected engineering, construction, and project management companies in the world." <http://www.bechtel.com/>

⁴ On September 5, 2017, ORS saw the 2016 Bechtel Report for the first time when it became available for viewing on the *Post & Courier* newspaper website. ORS is not in possession of the 2016 Final Report with a less blurry appearance.

ORS, because it did not make sense that Bechtel was engaged to look at the project but not the project schedule, especially when the schedule was such a point of concern.

27. The second Bechtel document recently obtained by ORS and attached as Exhibit 2 is a Draft Bechtel Project Assessment Report dated November 9, 2015 ("2015 Draft Report"). Page 1 of the 2015 Draft Report Executive Summary includes the same objective as in the 2016 Final Report - that an assessment of the project for the Units was done by Bechtel with the objective of assisting the owners, SCE&G and Santee Cooper "to better understand the current status and potential challenges of the project to help ensure the project is on the most cost efficient trajectory to completion." It also states the assessment was done for the purposes stated in the Professional Services Agreement between Bechtel and Smith, Currie & Hancock LLP, but does not include the date the Professional Services Agreement was executed.

28. In a significant difference from the 2016 Final Report, page 1 of the 2015 Draft Report states, "Based on Bechtel's assessment, the current schedule is at risk." The 2015 Draft Report also includes previously unreleased project completion dates. On page 1, the new commercial operation date ranges are December 2020 to August 2021 for Unit 2 and June 2022 to June 2023 for Unit 3. These ranges are also in section 5 titled "Analysis of the Project Construction Schedule."

29. The 2016 Final Report entirely excluded the dates Bechtel expected the project to be complete based on its assessment. The absence of the completion dates from the 2016 Final Report is especially significant when considering that in 2015 and 2016, SCE&G requested permission to modify its schedule completion dates for the Units to dates much earlier than the earliest date set forth by Bechtel in the 2015 Draft Report. In Docket No. 2015-103-E filed on March 12, 2015, SCE&G requested and was granted permission to move its completion dates

from March 15, 2017 to June 19, 2019 for Unit 2 and from May 15, 2018 to June 16, 2020 for Unit 3. There was no testimony in the 2015 proceeding from SCE&G about Bechtel, much less that Bechtel had been engaged to help SCE&G understand the current status and potential challenges of the project. In Docket No. 2016-223-E, filed on May 26, 2016, three months after the 2016 Final Report, SCE&G requested and was granted permission to move its completion dates from June 19, 2019 to August 31, 2019 for Unit 2 and from June 16, 2020 to August 31, 2020 for Unit 3. Like the 2015 proceeding, there was no testimony about Bechtel's engagement. Bechtel's assessment of the delay of the Units or the dates Bechtel expected the project to be complete was not shared with ORS or the Commission by SCE&G.

30. In addition on March 4, 2016, ORS sent the following Audit Information Request pursuant to S.C. Code Ann. §§ 58-4-55, 58-27-160, 58-27-1570, 58-33-230, and 58-33-277 to SCE&G that should have caused Bechtel's work to be identified, but it was not⁵:

Request 1-32:

Has SCE&G decided to retain the services of a Project Consultant as allowed in the Agreement? What are the costs associated with these services? Are these costs included in the current estimate of the Owner's Cost? Has a contract been awarded? If so, to whom? If this decision has not yet been made, please advise the target schedule for making a decision or implementing this service.

On March 24, 2016, SCE&G responded to Request 1-32:

Yes. SCE&G has decided to retain the services of at least two project consultants for consultation as to the process for the selection of construction payment milestones. One of the consultants, Work Management, Inc., has already performed its services, and SCE&G expects that the cost of those services will be less than \$5,000. The second company has not yet signed a contract or provided any services, but the costs should not exceed

⁵ The Audit Information Request titled, "ORS First Continuing Request for Records and Information," and other requests are available on the website of ORS under the "New Nuclear" tab:
<http://www.regulatorystaff.sc.gov/nuclear/Pages/V.C.%20Summer%20Units%202%20and%203.aspx>

\$25,000. There are sufficient funds in the Owner's Cost category to cover these amounts.

On June 24, 2016, SCE&G provided a supplemental response to Request 1-32:

SCE&G retained the consulting services of Work Management, Inc., concerning the selection of construction payment milestones. These consulting services were provided at no cost to SCE&G. With regard to the second consultant company referenced in Response 1-32, SCE&G has elected not to pursue the hiring of this company.

Although the 2016 Final Report's objective shows that Bechtel was operating as a project consultant, Bechtel was not included in the answer. The March 24, 2016 response is included as Exhibit 3, and the June 24, 2016 supplemental response is included as Exhibit 4.

31. Lastly, S.C. Code Ann. § 58-33-277 of the BLRA requires SCE&G to provide to ORS quarterly reports during the Units' construction. The quarterly reports are required to provide information on the progress of the construction, updated construction schedules, schedules of the capital costs incurred, updated schedules of anticipated capital costs, and updates on the qualification and selection of principal contractors and suppliers. S.C. Code Ann. § 58-33-277(A). Commission Order No. 2009-104(A) required that the quarterly reports also be filed with the Commission, and the past quarterly reports are located in Docket No. 2008-196-E. Neither Bechtel's assessment nor the Bechtel completion dates were put forth in the quarterly reports.

32. ORS likely would have taken different actions in 2015 and 2016 had ORS known about the level of Bechtel's involvement in the project and the completion dates put forth by Bechtel. Since this critical information was not shared, neither ORS nor the Commission were given the opportunity to consider Bechtel's assessment.

33. S.C. Code Ann. § 58-27-920 is an appropriate statute, because the BLRA, along with being deemed “constitutionally suspect,” does not contemplate situations in which information is not shared with state regulators. Further, SCE&G has recourse if the Commission issues an order pursuant to S.C. Code Ann. § 58-27-920. S.C. Code Ann. § 58-27-930 allows SCE&G to object to the Commission order by filing a petition with the Commission within 10 days after service of the Commission’s order. The petition may demand a hearing and require that the schedule of rates placed into effect under S.C. Code Ann. § 58-27-920 be suspended pending the hearing. S.C. Code Ann. § 58-27-930. In addition, the table in ORS’s Request showing the revenue increases from each revised rates proceeding provides evidence to the Commission in considering and setting “fair and reasonable” rates. Notwithstanding the table, ORS’s Request asks the Commission to suspend collection of all revised rates.

34. Further, another statute is also available to the Commission to provide the relief requested by ORS. South Carolina Code Ann. § 58-27-850 states:

SECTION 58-27-850. Investigation and change of rates by commission.

Whenever the commission after a hearing finds that the existing rates in effect and collected by any electrical utility for any service, product, or commodity are unjust, unreasonable, insufficient, unreasonably discriminatory, or in any way in violation of any provision of law, the commission shall determine the just, reasonable, and sufficient rates to be thereafter observed and in force and shall fix the rates by its order.

35. Although S.C. Code Ann. § 58-27-850 could have been asserted by ORS, ORS initiated this proceeding and filed its Request pursuant to S.C. Code Ann. § 58-27-920, because S.C. Code Ann. § 58-27-920 allows the Commission the opportunity to take swift action.

36. SCE&G asserts that S.C. Code Ann. § 58-27-860 is the appropriate statute under which ORS should have filed its Petition. However, a proceeding under S.C. Code Ann. § 58-27-860 must be initiated by the electrical utility.

37. To the extent that SCE&G argues that suspension of the rates is prohibited, ORS disagrees as the suspension, if granted, would be based on sufficient evidence, including new evidence which the Commission should have had the opportunity to consider.

38. ORS defers all constitutional arguments related to the BLRA as detailed in the Attorney General's Opinion and its impact on refunds or credits to the party-intervenor Attorney General Wilson, including those constitutional arguments related to the Takings Clauses and Commission obligations.

Conclusion

39. ORS respectfully submits that this Brief and the other filings by ORS in this docket support a denial of SCE&G's Motion to Dismiss and that ORS's Request should be acted on by the Commission.

Respectfully submitted,

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Columbia, South Carolina
November 21, 2017